

1 CLAIRE LEARY
2 912 Cole Street, Suite 347
3 San Francisco, California 94117
4 atyleary@aol.com
5 415-225-4640
6 Attorney for Defendant Chanthavong

7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9 United States of America,

10 Plaintiff,

11 vs.

12 Raymond Chow,
13 Kongphet Chanthavong, et al.,

14 Defendants.

Case No. CR 14-196

**Defendant Chanthavong's Motion to Suppress
Evidence and Request for Evidentiary Hearing**

Hearing: September 9, 2015

15
16 **Introduction**

17 Defendant Kongphet Chanthavong moves to suppress evidence seized pursuant to the search
18 warrant executed at 2715 Magnolia St., and at 47 Daly City, and to suppress the fruits of the poisonous
19 tree of those searches. He requests that the Court hold an evidentiary hearing pursuant to Franks v.
20 Delaware, 438 U.S. 154, 98 S.Ct. 2674, to allow the defense to establish the falsity of the search
21 warrant affidavit.

22 **Facts**

23 Oakland Police Officer, Teddy Chu was the affiant for a search warrant for the premises at
24 2715 Magnolia Street, Oakland, and 47 Perita Drive, Daly City, on October 23, 2012. Exhibit A
25 (exhibits will be filed separately under seal). An Oakland Superior Court Judge signed off on the
26 warrant the same day. The premises were searched the next day, October 24th, and Mr. Chanthavong
27 was arrested at 47 Perita in Daly City. Mr. Chanthavong is charged in Count 125 with the
28 manufacture of marijuana, in Count 126 with the possession of a firearm in furtherance of a drug

1 trafficking crime, and in Count 124 with possession with intent to distribute 500 grams or more of
 2 cocaine. These charges are all based on the evidence seized pursuant to the search warrant which is
 3 challenged here.

4 **Argument**

5 **1. The affidavit is based on a blatant misstatement that a concerned citizen gave**
 6 **information that the Magnolia premises might contain a grow operation.**

7 Officer Chu swore to the state court Judge that “he had received information from a concerned
 8 citizen that 2715 Magnolia Street, Oakland, California may contain a clandestine, indoor marijuana
 9 grow.” Exhibit A at 11045. According to the Government, the “concerned citizen,” is actually an FBI
 10 agent. AUSA Hasib has informed me that FBI Special Agent David Vanderporten was the concerned
 11 citizen who supposedly said that 2715 Magnolia “**may**” contain a clandestine, indoor marijuana grow
 12 (emphasis added).

13 The issuing Judge had the right to know who thought the premises may contain a marijuana
 14 grow and on what the “citizen” based his belief. The affidavit also fails to state what information the
 15 agent gave to Chu. The affidavit states only that the affiant received information from a concerned
 16 citizen that the Magnolia building may contain a grow. Because the basis of the affidavit is deceptive
 17 and disingenuous this Court should suppress the items seized pursuant to the warrant.

18 Chu’s misstatement was deliberate. He knew well that he got his information from an Agent
 19 and not from a “concerned citizen.” This Court should take the error seriously. The Ninth Circuit has
 20 recently explained that “[w]e are mindful that “[b]y reporting less than the total story, an affiant can
 21 manipulate the inferences a magistrate will draw,” and that [t]o allow a magistrate to be misled in such
 22 a manner could denude the probable cause requirement of all real meaning.” United States v. Ruiz,
 23 758 F.3d 1144, 1148 (9th Cir. 2014), citing United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985),
 24 amended by 769 F.2d 1410 (9th Cir. 1985).

25 Ruiz is instructive, because although the Court ultimately affirmed the denial of the
 26 suppression motion, it recognized that the failure to disclose to the magistrate judge the witness’s
 27 involvement with drugs and her agreement to act as a confidential informant was a reckless omission.
 28 Ruiz, 758 F.3d 1144, 1150-51.

1 An affiant's failure to disclose information about his source can be fatal to a warrant. United
 2 States v. Hall, 113 F.3d 157, 159 (9th Cir. 1997). Hall determined that no probable cause supported a
 3 search warrant where the government recklessly failed to disclose all of an informant's prior
 4 convictions during a warrant hearing. Hall, 113 F.3d at 159. This Court should find that the
 5 misstatement was serious enough to destroy the warrant's probable cause showing.

6 **2. Excision of the false statement from the affidavit leaves the warrant devoid of a**
 7 **showing of probable cause to establish that Magnolia contained a marijuana grow.**

8 The warrant is wholly lacking in probable cause when the false statement is excised from the
 9 affidavit. The Ninth Circuit has recently reiterated the showing that must be made to invalidate a
 10 search based on a warrant. "[T]he court determines whether the affidavit, once corrected and and
 11 supplemented, establishes probable cause." Ruiz, 758 F.2d 1144, 1148, citing Ewing v. City of
 12 Stockton, 588 F.3d 1218, 1223 (9th Cir. 2009). Here the affidavit will not survive this scrutiny

13 Chu claimed that PG&E responded to an administrative subpoena, giving him information
 14 about electricity at Magnolia. Exhibit A at 145. Actually the Agent who was erroneously described as
 15 a citizen informant served the administrative subpoena. Chu's description of what he received is
 16 replete with exaggeration. Chu told the magistrate for instance that the "Trouble Man" from PG&E
 17 wrote in his field note for Magnolia: "Possible grow . . . referred to Revenue Assurance." Exhibit A at
 18 146. But there is no indication that Revenue Assurance took action to correct a serious problem.
 19 Similarly, according to the affidavit, the meter box had been bypassed, yet there was no action taken to
 20 remedy that situation.

21 The affidavit twists and misrepresent, and then adds in unrelated innuendo in an attempt to
 22 cover its holes. Chu criticizes that Chanthavong failed to fill out a section of the PG & E form which
 23 asks what kind of appliances were being used. "Through my training and experience I believe
 24 Chanthavong intentionally left the "appliances used" section blank, because marijuana cultivators
 25 often steal electricity; therefore, do not have an accurate measure of kilowatt hours used per month.
 26 This coupled with Chanthavong's lack of technical knowledge of running a printing business would
 27 not justify the high volume of electricity being consumed." Exhibit A at 146.
 28

1 Nowhere does the affidavit state a measure of electricity being used or the cost of the
2 electricity. There is also no measure of the normal amount of electricity used, nor of what was paid
3 for the electricity. The affidavit sums up by claiming, with no support whatsoever, that Mr.
4 Chanthavong lacked the technical knowledge to run a printing business.

5 The affidavit claims that at the beginning of June, almost five months before the warrant
6 issued, PGE went to the 2700 block of Magnolia to investigate an overloaded transformer. Chu
7 claimed that an electrical meter box had been bypassed. He also maintained that the wires were hot.
8 The affidavit does not show that PG&E did anything to stop or change the situation it found in June.
9 Indeed in July PG&E, after the transformer was overloaded, PG&E restored power at Mr.
10 Chanthavong's request, and it appears that no further investigation was conducted by PGE.

11 The behaviors described in the affidavit are innocuous. It claims that surveillance revealed
12 that Mr. Chanthavong used counter surveillance techniques in driving. Mr. Chanthavong drove to
13 Magnolia, made a K or three-point turn, sat in the car for a couple minutes and then entered the
14 premises. It further maintains that the "surveillance team" only saw Mr. Chanthavong at the premises.
15 The affidavit claims that the team was there at different times and days of the weeks but saw no one
16 else there. There is no description of for how long or over what period of time the surveillance was
17 conducted.

18 Lastly, it is simply not possible that the affiant smelled marijuana from outside the building on
19 Magnolia. Given the size and location of the building the affiant would have been approximately 80
20 feet away from a grow with large doors keeping odor away. Nor would a hum from fans have been
21 audible. These are unsupported exaggerations that fail to support a probable cause finding.

Conclusion

For the foregoing reasons Mr. Chanthavong requests that the Court suppress items seized at 2715 Magnolia, Oakland, and at 47 Perita Drive, Daly City.

August 12, 2015

Respectfully submitted,

/s/

Claire Leary

Counsel for Defendant Chanthavong